Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier	)	
Selection Changes Provisions of the	)	
Telecommunications Act of 1996	)	CC Docket No. 94-129
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of Consumers	)	
Long Distance Carriers	)	

AT&T COMMENTS

Pursuant to the Commission's April 7, 2004 Public Notice in this matter,[1] AT&T Corp. ("AT&T") submits these comments on the petition of MCI (formerly WorldCom, Inc.) for a declaratory ruling that the definition of the term "customer of record" adopted by the West Virginia Public Service Commission ("PSC") for carrier change verification purposes directly conflicts with, and negates, the Commission's carrier selection rules, and should therefore be preempted.[2] AT&T agrees that MCI has raised a serious question regarding the lawfulness of the PSC's definition in light of the Commission's rules and policies, and that this issue warrants resolution by the Commission unless the PSC, in a proceeding now pending there, reconciles its definition with the Commission's rules.

Through the proceedings in this docket and related prior rulemakings, the Commission has adopted a comprehensive set of requirements for carriers' solicitation

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1 DA 04-962, 69 FR 23,578 (April 30, 2004).

2 *See* Petition of WorldCom, Inc. for Declaratory Ruling that West Virginia's Definition of Customer of Record Is Inconsistent with the FCC Rules, filed March 12, 2004 ("Pet.").

and verification of customer orders to change their selection of carriers for long distance, local toll and local exchange services.[3] In the Telecommunications Act of 1996, as part of its initiative to open telecommunications markets to competition Congress enacted Section 258 of the Communications Act conferring authority upon the Commission to prescribe intrastate verification procedures for local exchange and local toll (intraLATA) carrier selection, as well as for interstate services.[4] The Commission's administration of the carrier selection process under the amended statute has enabled customers to conveniently choose from among competing service providers while providing important protection against unauthorized carriers changes – the abusive practice commonly referred to as "slamming." The Commission's regime has promoted the already intense intercarrier competition in long distance markets, and facilitated the emergence of nascent competition in local exchange and local toll service markets that have hitherto been monopolized by incumbent local exchange carriers ("LECs").

As part of that process, the Commission in the *Third Report and Order* adopted a definition of the term "subscriber" that was expressly designed to serve the

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3 *See* 64 C.F.R. § 1100 *et seq. See also Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Third Order on Reconsideration and Second Notice of Proposed rulemaking, 18 FCC Rcd 5099 (2003) *(Third Reconsideration Order)*; Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000) (*Third Report and Order*); Errata, DA 00-2163 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000); Order, 16 FCC Rcd 4999 (2001); Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (*Second Report and Order), stayed in part, MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999) (*Stay Order*), *motion to dissolve stay granted, MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000); First Order on Reconsideration, 15 FCC Rcd 8158 (2000); Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), *recon. denied*, 8 FCC Rcd 3215 (1993); *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911, 101 F.C.C.2d 935, *recon. denied*, 102 F.C.C.2d 503 (1985).

4 47 U.S.C. § 258(a); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

goals of promoting customer choice, consumer protection, and competition.[5] Specifically, Section 64.1100(h) of the Commission's rules, 47 C.F.R. § 64.1100(h), provides:

> "The term *subscriber* is any one of the following:
>
> (1) The party identified in the account records of a common carrier as responsible for payment of the telephone bill;
> (2) Any adult person authorized by such party to change telecommunications services or to charge services to the account; or
> (3) Any person contractually or otherwise lawfully authorized to represent such party."

As the Commission noted in adopting this rule, "the definition will allow customers of record to authorize additional persons to make telecommunications decisions, while protecting consumers by giving the customers of record control over who is authorized to make such decisions on their behalf."[6] AT&T, MCI and other carriers have routinely relied on this definition in obtaining and verifying carrier change orders. In particular, third party verifiers for both MCI and AT&T as part of their scripts request the person placing a carrier selection order to state whether he or she is authorized by the customer of record to make that selection.[7]

However, as MCI points out (Pet. at 2), the PSC has adopted a different, and far more restrictive, definition of the persons who are authorized to order a carrier change. The West Virginia regulation provides:

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5 *See Third Report and Order*, 15 FCC Rcd at 16019-20 ¶ 48.

6 *Id.*

7 Pet. at 2. Compliance with Section 258 and the Commission's verification process does not require that the individual placing the order have actual authorization from the customer of record, so long as the carrier relies in good faith on the individual's representation that such authority has been conferred. *See AT&T Corp. v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

> "In order for a telecommunications carrier to obtain subscriber confirmation of a change in local exchange telephone service or change of presubscribed interexchange carrier (PIC) providing intrastate toll service, a telecommunications carrier must, *from the customer of record*, perform one of the following [verification procedures] . . . ."[8]

As MCI shows in its Petition (at 2), the PSC staff has taken the position that pursuant to the state's rule carriers may no longer obtain orders from, or perform third party verification with, persons other than the customer of record -- even if those procedures would satisfy the requirements adopted by the Commission described above.[9]

This stark conflict between federal and state presubscription requirements created by the PSC staff's interpretation of that agency's rule raises important legal questions. States do not have unfettered discretion to adopt presubscription rules, or interpretations of those rules, that diverge from the Commission's rulings in this area.[10] It is well established that inconsistent state regulation is preempted if the state regime would negate the exercise of the Commission's authority where the interstate aspects of

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8 Rule 15 CSR 6.2.8(b)(emphasis supplied).

9 Insofar as it might be read to apply to carrier selections by business subscribers, the PSC rule would entirely preclude those entities from making either an initial choice of carrier or changing their chosen carrier, because as the Commission has recognized those subscribers must by definition act through their employees or agents. *See Third Report and Order*, 15 FCC Rcd at 16019-20 ¶ 47 (noting consensus among commenters that "with regard to business services, the term 'subscriber' should be defined so as to allow contractually or lawfully authorized agents to make telecommunications decisions on behalf of the customer of record")(footnote omitted). The PSC rule is therefore a patent nullity as to business subscribers.

10 Moreover, state regulatory commissions that have elected to administer the federal carrier selection and verification procedures pursuant to Section 64.1110 of the Commission's rules (47 C.F.R. § 64.1110) must do so in accordance with the Commission's rulings and may not adopt contrary interpretations of those regulations. The Commission's rule authorizing state enforcement provides that those agencies may only administer that process "*as enumerated in* §§ 64.1100 through 64.1190" (emphasis supplied).

the subject matter are inseverable from the regulation of the intrastate aspects.[11] This principle applies here because it is technologically impossible to apply both the federal and state requirements to the same service.[12]

It is therefore indisputable that the PSC rule could not lawfully be applied to interLATA carrier selections because with current technology customers must select the same interLATA carrier for both interstate and intrastate service.[13] Under the PSC rule, an authorized representative of a customer of record would be precluded from ordering or providing verification of an interLATA carrier selection for interstate service, in direct contravention of the Commission's express rule permitting such an authorized person to perform these activities. Settled law therefore preempts the Pac's rule.

However, the inconsistencies between the PSC's rule and federal presubscription requirements are not limited to interLATA carrier selections. The Commission's rules contemplate that customers or their authorized representatives will be permitted to select and provide verification for the same carrier for interLATA, intraLATA and local exchange service in the same transaction, so long as they provide separate authorizations and verification for each selected service.[14] As MCI correctly points out (Pet. at 6), intraLATA and local carrier changes are often ordered and confirmed at the same time as the choice of a carrier for interstate and intrastate

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11 *See, e.g., Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

12 *See, e.g., National Association for Information Services (Petition for Expedited Declaratory Ruling)*, 8 FCC Rcd 698 (1991), *recon. denied*, 10 FCC Rcd. 4153 (1995) (preempting inconsistent state blocking rules for 900 traffic because carriers could not distinguish between interstate and intrastate traffic).

13 West Virginia is comprised of LATAs 240, 254 and 256.

14 *See* 47 C.F.R. §§, 64.1120(b), 64.1130(e)(4).

interLATA service in compliance with the Commission's rule. Under the PSC's regulatory scheme, however, the customer's authorized representative may only authorize and verify the selection of the interLATA carrier, and the selection and verification of other levels of service may only be made by the customer of record in a separate transaction. Here again, the PSC's prescribed procedure conflicts on its face with the Commission's requirements.

Additionally, as MCI's Petition (at 2-3) correctly points out, the PSC's conflicting procedure imposes substantial cost and inconvenience on both customers and carriers. In the marketplace fostered by the Commission's presubscription rules and other pro-competitive policies, carriers are increasingly marketing "all distance" services which offer customers a set price for usage regardless of whether they place interstate or intrastate calls, or whether their calling is interLATA, intraLATA and/or local.[15] AT&T's experience confirms the Petition's showing that the PSC's process impedes customers' ability to avail themselves of these combined offerings.[16] Moreover, the PSC's requirement imposes substantial unwarranted costs on carriers who must adopt

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15 For example, AT&T's Unlimited Plus Plan offers unlimited state-to-state, in-state and local toll calling for a single monthly fee. However, to be eligible for this service, customers must be presubscribed to AT&T for intraLATA service; under the PSC's procedure, such authorization and verification can only be provided by the customer of record for such service, even though the Commission's rules allow the customer's authorized agent to select AT&T for interstate and intrastate interLATA service.

16 Under the PSC's procedures limiting authorization and verification to the "customer of record," residential consumers may be precluded from making *any* carrier changes. For example, AT&T's experience indicates that widows frequently retain telephone service in the name of their deceased spouse as a security measure (*i.e.*, to avoid disclosure of the fact they reside alone). Because the decedent remains the customer of record the surviving spouse cannot authorize or verify any carrier change under the PSC rule. Similarly, the adult child of an elderly and infirm parent who has been conferred power of attorney to manage the parent's financial or other affairs nevertheless may not under the PSC rule authorize a carrier change if the parent is the "customer of record" for telephone service.

special state-specific marketing procedures and perform repeated, costly (and quite possibly still fruitless) attempts to market their services with inadequate – if, indeed, *any* — information concerning the identity of the customer of record.[17]

The Commission has declined to preempt all state regulation of carrier changes in order to promote complementary regulatory regimes to combat slamming. The Commission has therefore held that "a state must accept the same verification procedures as prescribed by the Commission," but that the state "may accept *additional* verification procedures for changes to intrastate service if such state concludes that such action is necessary based on its local experiences."[18] The PSC's regulation, however, is not such a supplement to the Commission's existing verification processes. To the contrary, by precluding a customer's authorized agent from authorizing or verifying a carrier change order as permitted by the Commission's rules, the state regime has significantly limited the range of carrier selection procedures otherwise available to customers and carriers. As such, the state rule is *not* an addition to federally authorized

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17 As the Court of Appeals observed only last year, carriers that solicit carrier selection orders from consumers other than their own customers face "a virtually impossible task" because they are precluded under Section 64.1201 of the Commission's rules (47 C.F.R. § 64.1201) from using billing name and address ("BNA") information for marketing purposes:

> While a customer's current local exchange carrier might be able to verify the subscriber's identity by consulting its own customer records, the Commission itself has acknowledged that "long distance service providers often lack access to the [local exchange carrier] account records containing the pertinent information" about the customer of record.

323 F.3d at 1086, *citing Third Report and Order*, 15 F.C.C. Rcd at 16020 ¶ 49 n.145

18 Second Report and Order, 14 FCC Rcd at 1562 ¶ 87 (emphasis supplied) *See also id.*, ¶ 88 ("In other words, absent a specific preemption determination, *a state may provide carriers with further options* for verifying carrier changes to intrastate service, *in addition to* the Commission's three verification options") (emphasis supplied).

procedure, but contravenes the Commission's intent and purpose by impeding consumers' ability to change carriers.

The Commission has also made clear that it will not issue general rulings preempting state regulation of the presubscription process, but will instead address preemption case-by-case, based on the record adduced for a particular state law.[19] As MCI recognizes (Pet. at 3-4), the Commission previously refused to preempt state rules that differ from the federal definition of the term "subscriber," but the Commission did so only because no specific state law had been placed in issue.[20] The Commission is now presented with that concrete controversy that will allow it to evaluate the conflict between the state and federal provisions regarding this key term for regulating the carrier selection process.

Before expending its scarce administrative resources, however, the Commission should await the outcome of a proceeding now pending before the PSC in which AT&T has requested a declaratory ruling to reconcile the state's interpretation of the term "customer of record" with the Commission's definition of the term "subscriber."[21] AT&T in that proceeding has demonstrated that the PSC's rule and related staff interpretation are clearly inconsistent with the Commission's requirements,

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19 *See id.*, 14 FCC Rcd at 1562-63 ¶ 89 (stating "the Commission will not make a preemption determination in the absence of an adequate record clearly describing the state law or action to be preempted and precisely how that state law or action conflicts with federal law or obstructs federal objectives"); *see also Third Report and Order*, 15 FCC Rcd at 16036 ¶ 87 (same).

20 *Third Reconsideration Order*, 18 FCC Rcd at 5140 ¶ 106.

21 Petition of AT&T Communications of West Virginia, Inc. for a Declaratory Ruling to Enhance Consumers' Ability to Obtain Telephone Services In a Commercially Reasonable, Efficient and Convenient Manner, Case No. 04-0555-T-P (W.V. PSC), filed April 14, 2004. A copy of AT&T's declaratory ruling petition filed with the PSC is attached as Exhibit A. To date, Verizon West Virginia and the West Virginia Consumer advocate have intervened in the PSC proceeding. AT&T also believes that other carriers, including MCI, will intervene as well.

and that as a matter of regulatory policy the PSC should in all events modify its procedure to better promote consumer convenience and choice. If the PSC acts favorably on AT&T's petition, it will be unnecessary for the Commission to further address MCI's Petition. Otherwise, the Commission will through this comment cycle have compiled the necessary record for decision and may then proceed to resolve the serious inconsistency between the Commission's subscriber definition and PSC rule as that regulation is now interpreted by that agency's staff.

WHEREFORE, for the reasons stated above, the Commission should defer action on MCI's Petition pending the completion of the PSC's current proceeding on AT&T's request for a declaratory ruling from that agency regarding interpretation of its definition of customer of record, and upon completion of that proceeding should address the Petition to the extent that the PSC has not reconciled its definition with the Commission's rules.

Respectfully submitted,

/s/ Peter H. Jacoby
Lawrence J. Lafaro
Peter H. Jacoby

AT&T Corp.
One AT&T Way
Room 3A251
Bedminster, N.J. 07921
Tel: (908) 532-1830
Fax: (908) 532-1219

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Exhibit A

BEFORE THE
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

In the matter of **Petition of AT&T Communications of West Virginia, Inc. for a Declaratory Ruling To Enhance Consumers' Ability To Obtain Telephone Services In a Commercially Reasonable, Efficient and Convenient Manner**	* * * * * * * * *	**Case No. 04-____-T-P**

PETITION FOR DECLARATORY RULING

AT&T Communications of West Virginia, Inc. respectfully files its Petition for a Declaratory Ruling which clarifies and expands the rights of consumers to request changes in their telephone services. Specifically, AT&T seeks a ruling establishing that a person with "apparent authority" satisfies the definition of "subscriber" for the purposes of effectuating changes in telephone service providers. AT&T also seeks clarification that such changes do not violate the "anti-slamming" law of the state.

This petition is made necessary because the Staff of the Commission's Consumer Affairs Division ("Staff") takes the position that AT&T and other telephone companies[1] are "slamming" customers – that is, changing the customer's telephone service provider

[1] This issue is of substantial interest to other carriers as well. On March 12, 2004, WorldCom, Inc. filed its own Petition for a Declaratory Ruling on this matter with the Federal Communications Commission. On April 7, 2004, the FCC released a notice requesting comments on WorldCom's Petition, to be filed 45 days after publication of the FCC's notice in the Federal Register. Federal Communications Commission CC Docket No. 94-129. A prompt decision by the Public Service Commission of West Virginia granting the relief AT&T seeks herein will obviate any need for FCC involvement on this issue.

without the customer's permission – whenever the telephone companies accept a change request from anyone other than the person whose name appears on the telephone bill.

The Staff's approach hinders consumers' ability to obtain the telephone services they want. Under Staff's view, for example, a wife is unable to request a change in the household's telephone service if the service is listed in the husband's name.[2] But that approach is sorely outdated. Long gone are 1950's "Ozzie and Harriet" households where all decision-making and financial responsibility resided in the husband while wives were expected to care for the children and the home. The 21st century household is defined, more often than not, by two working partners who share all of the household responsibilities, including those related to the family finances and family business decisions.

Unfortunately, Staff's interpretation of the rules leaves things firmly stuck in the 1950's and handicaps spouses who are fully capable of making decisions in the best interest of the household. AT&T's sales calls offering savings on residential telephone services often reach the wife. In many instances, even though the wife is very interested in AT&T's services, and even though she is a full partner in household decisions (indeed, in many cases, the wife is the person paying the bills and making most of the family business decisions, including those related to telephone service), AT&T is not able to sell her the services she wants.

Staff's approach is not only out of touch with modern household realities, it is at odds with the FCC's rules and with those of nearly every other jurisdiction. In most

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[2] Under Staff's interpretation of the rules, neither could an adult child request a change on behalf of an elderly parent, even though the elderly parent depends on the adult child to manage household affairs. Similarly, where two adults are living together, one "significant other" cannot order a change if the telephone service is listed in the other's name, even though both agree on the change.

every state, so long as the person answering the telephone asserts that he or she has authority to make changes in the account,[3] AT&T is able to process the changes, even if the person answering the phone is not the person whose name appears on the bill.

Significantly, the Staff's views are not articulated in any specific rule adopted by this Commission, nor are they mandated by any statutory reference set forth in the *West Virginia Code*. Rather, the Staff's approach is driven by what is, in AT&T's view, Staff's well-intentioned but legally incorrect reading of the Commission's Rules and Regulations for the Government of Telephone Utilities ("Telephone Rules"), as well as an equally incorrect reading of Commission decisions that relate to other matters.

Fortunately, misinterpretations of rules are easy to correct. The Commission does not need to change its Telephone Rules in order to modernize its policy. Rather, all that is required, and all that AT&T seeks here, is a ruling from the Commission that so long as the person called asserts that he or she has authority to effectuate changes in the telephone services for the account, AT&T (or whatever telecommunications company is selling service) may accept and process the order. Such a ruling not only would bring West Virginia into the mainstream of states, it would also bring the Staff's outmoded interpretation of Commission policy into the 21st century.

West Virginia consumers will be well-served by such a ruling. In AT&T's experience, more than a few consumers have been frustrated when, after deciding that a change in telecommunications services will best serve their needs, they learn that AT&T cannot process their request because the telephone service is not in their name. In many instances, that stops the potential transaction dead in its tracks – the customer hangs up,

[3] This is generally referred to as having "apparent authority." As noted below, the vast majority of states permit persons with "apparent authority" to request changes in telecommunications services.

and blames AT&T for being difficult. AT&T loses a sale and, even worse, its reputation is damaged. Even if the customer is willing to have AT&T call back and speak to the person whose name is on the bill, there can be no debate that this is a major inconvenience, nor can there be any debate that this needlessly increases AT&T's costs.

Modernizing the Staff's approach is more important now than ever before. Some telephone companies, AT&T included, have recently decided to enter the West Virginia local exchange market. The Staff's outdated and impractical rule interpretations, however, are making it virtually impossible to sell service to customers who want AT&T. Data gathered in February indicate that fully two-thirds of the potential customers AT&T called were unable to take advantage of AT&T's services because they were the spouse of the person whose name appears on the bill. In a number of remarkable instances, AT&T could not process the customers' orders even though the spouse whose name appears on the bill is deceased. Needless to say, the outcome of those calls frustrated the consumers, tarnished AT&T's image, and wasted everyone's time and resources.

A. Nothing in the Code, the PSC's Rules, or the Case Law Dictates That the Only Person Who Can Order Changes in a Household's Telephone Service is the Person Whose Name Appears on the Bill.

West Virginia case law recognizes that a principal (here, the customer of record) may permit an agent acting on the customer's behalf to request a change of service. A person who asserts he or she has authority to act on behalf of the principal (the customer of record) can be reasonably presumed to be the agent of the customer of record. *Bluefield Supply Co. v Frankel's Appliances*, 149 W.Va. 622, 142 S.E.2d 898 (1965). Indeed, where, as here, customary practice makes it reasonable and prudent to assume that the person asserting authority can act on behalf of the principal, the agency

relationship exists. *Uniontown Grocery Co. v. Dawson,* 68 W.Va. 332, 69 S.E. 845 (1910); *Cassiday Fork Boom Lumber Co. v. Terry*, 69 W.Va. 572, 73 S.E. 278 (1911); *Perkins v, Friedberg*, 90 W.Va. 185, 110 S.E. 618 (1922); *State ex rel. Yahn Elec. Co. v. Baer*, 148 W.Va. 527, 135 S.E.2d 687 (1964); *Rowe v. Grapevine Corp.*, 193 W.Va. 274, 456 S.E.2d 1(1995). The agency relationship need not be in writing. *Clark v. Gordon*, 35 W.Va. 735, 14 S.E. 255 (1891). Nor does it necessarily need to be formalized in advance, so long as the principal subsequently ratifies the agent's actions. *Bourn v. Dobbins*, 92 W.Va. 263, 115 S.E. 424 (1922), *Rees Electric Co. v. Mullens Smokeless Coal Co.*, 141 W.Va. 244, 89 S.E.2d 619 (1955), *Lohr Funeral Home v. Hess & Eisenhardt Co.*, 152 W.Va. 723, 166; S.E.2d 141 (1969). One spouse can function as an agent for the other. *Watring v. Gibson*, 84 W.Va. 204, 100 S.E. 68 (1919), *Lusher v. Sparks*, 146 W.Va. 795, 122 S.E.2d 609 (1961).

Nothing in the West Virginia statutes precludes an agent from being able to request a change in telephone service. *West Virginia Code* §24-2E-1, Transfer of phone service providers, provides that "No telephone public utility may submit a change on behalf of a subscriber in the subscriber's selection of a provider of telephone service, except in accordance with the requirements of this section and the rules adopted by the public service commission." Nothing in that Code section defines what is meant by "subscriber." More to the point, nothing in the Code mandates, or even remotely implies, that the term "subscriber" must be read so narrowly as to limit it exclusively and solely to the person whose name appears on the bill.

The Commission's rules implementing this provision do not define the term "subscriber," either. Rather, for the term "Subscriber", the Commission's Telephone

Rules, at 1.7.ww., simply refer to the term "Customer." The term "Customer" is defined at Rule 1.7.m. as "Any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency, etc. who purchases telecommunications services from a telephone company."

Telephone Rule 2.8(b)(3) provides that before a carrier can process a change in a customer's service, the telecommunications carrier ". . . must, from the *customer of record* . . . orally verify the change of carrier request through an appropriate, independent third-party." (emphasis supplied). But just as the term "subscriber" is left undefined, so too is the term "customer of record." Nothing in the rules implies, much less dictates, that "customer of record" can only be the person whose name appears on the bill. Indeed, a more reasonable reading of "customer of record" includes not only the person whose name is on the bill, but also anyone else, such as a spouse, partner, or roommate, who could reasonably be expected to have authority to request changes in the account. Certainly nothing in the definition of "Customer" mandates that such party be the person whose name appears on the bill, as the Staff would require. Instead, the definition of "Customer" refers to the party that "purchases telecommunications services," a definition sufficiently broad to encompass any member of the household with apparent authority to order or change service.[4]

By referring to the party that "purchases telecommunications services" rather than the person whose name appears on the bill, the actual rule would seem to be more in line

[4] Indeed, under Staff's application of the rules, a wife would be able to place the initial order for telephone service, but if on that initial call she requested that the service be listed in her husband's name, she would be unable to make any subsequent changes to the service. What makes that particularly egregious is that no one from the telephone company would have explained to her on the initial call that the manner in which she elected to have the service listed would have any bearing on the household's ability to request changes in the service.

with existing commercial practice than the Staff's approach. At the initial point of sale telephone customers historically have never been asked to identify which persons are, or are not, authorized to make changes in the account. Had that been the case, it might be possible to give the term "customer of record" the extremely narrow meaning Staff ascribes. The reality, however, is that when a customer initially ordered telephone service, the caller was asked to provide a name for billing purposes and, typically, the one name given was, in most instances, but not always, the husband's name. If, in that initial contact, the caller had been informed that the name(s) on the account would have some future bearing on the household's ability to request changes in service, odds are that a large number of customers, probably most, would have listed the service as "Mr. and Mrs." or would have included both roommates or partners on the account. The rule should be interpreted consistent with that modern-day reality.

The difficulties caused by the Staff's interpretation of the Commission's Rules are even more pronounced in the case of business customers. If a business customer, such as Dow Chemical, desires to change its local service provider in West Virginia, who is the "Customer of Record?" Is the only person authorized to change the service for Dow the President of the Corporation or the head of the division of Dow that is listed on the billing record? It is simply not practical or realistic to think that the only person who could change the local provider for Dow Chemical would be the President of the Corporation, or, where the "customer of record" is listed as the accounts payable office, that only a particular accounts payable clerk could make the decision to effectuate changes to Dow's service and/or to switch providers.

In discussions with the Staff, AT&T has been informed of Staff's belief that this Commission's decision in *Stevens v. Columbia Gas of West Virginia, Inc.*, Case No. 80-560-G-C, March 19, 1981, is controlling in this context. But that case dealt with an entirely different issue than the one being raised here. In *Stevens* the Commission was confronted with the question of whether a tenant must be notified before gas service is discontinued where the landlord, in whose name service was being provided, had requested that the service be terminated. The decision in *Stevens* held that the landlord, as the customer or record of Columbia Gas, had the right to request that service be terminated, that the tenant had no status as a "customer" because he had no relationship with the gas company, and that the dispute between the landlord and his tenant was a private contract matter beyond the Commission's jurisdiction. There was no assertion that the tenant had authority to act on behalf of the landlord. In short, *Stevens* held only that a utility owes no special duty to anyone other than its "customer."

That decision provides no guidance here, because it did not address the issue of apparent authority and did not decide who can be included within the definition of "customer." The case did not hold, for example, that only "Mr. Landlord" could have terminated service, and not "Mrs. Landlord," because gas service was listed solely in the name of "Mr. Landlord." While dicta in the decision provided that, under the *Rules and Regulations for the Government of Gas Utilities* in effect at the time, the term customer "refers to the person whose name is on the bill," that language, viewed in the overall context of *Stevens*, meant only that the landlord was "the customer" because he had the relationship with the gas company and the tenant did not. *Stevens* simply did not address the issue being raised here, namely, whether the spouse (or partner, or significant other,

or roommate) acting as an agent with decision-making authority on behalf of the "customer" whose name is on the bill also has authority to effectuate changes in "the customer's" telephone service.

Likewise, the case of *Paula Marie Miller v. Equitable Gas Company*, Case No. 81-312-G-C, Order entered September 1, 1982 (a decision which followed the Commission's holding in *Stevens*) also does not preclude the result AT&T seeks here. In the *Miller*, case, Equitable had denied service to Mrs. Miller when she attempted to obtain service in her own name after her divorcing husband moved out of the house, requested termination of service, and failed to pay the outstanding gas bill. Equitable had argued that it was proper to deny service to Mrs. Miller at that location because she was a member of the same household and there was an outstanding balance on the account. In following *Stevens*, the Commission held that, as a result of the divorce, Mrs. Miller was entitled to establish gas service in her own name as a new and separate customer. The Commission ruled that upon her husband's departure, her request for service was as a "new" customer and not as a member of the household that previously obtained service at that location. Here again, *Miller* does not address the issue at hand – namely, whether a person in the same household can request a change in service if, acting as agent for the "customer of record" they assert authority to do so.

Thus, neither *Stevens* nor *Miller* is applicable here. *Stevens* dealt with a landlord –tenant situation and *Miller* dealt with a divorce situation. Neither case dealt with a request for a change in service by a member of a viable household with apparent authority to make the request.

Moreover, both the *Stevens* and *Miller* cases differ in another vitally important respect, in that they involved customer relationships with monopoly utilities. This case arises in the context of a competitive service where customers can and do frequently switch service providers. Competition means lower prices and more choices, but those benefits are lost if consumers are not able to obtain the services they want in a fast, easy, efficient manner. It is in the public interest to make it easy for customers to exercise their right to choose alternate service providers rather than impose restrictions on their ability to do so.

Finally, it must be noted that the domestic relations laws of West Virginia have changed since the Commission's decision in *Miller*. In *Miller*, the Commission rejected an argument that Equitable was justified in requiring Mrs. Miller to pay the former account because *West Virginia Code* §48-3-22 held that a husband and wife were jointly liable for purchases for the support of the family, citing then-existing *West Virginia Code* §48-3-22 as requiring "that it is the duty of the husband to support his family, and that his property when found must be applied first to satisfy any such joint liability". Since *Miller* was decided, West Virginia's domestic relations law has been changed and *Code* §48-3-22 no longer exists. The new law states in pertinent part: "In no case may any act, contract or obligation of a married woman require, for its validity or effectiveness, the authority of her husband or of a judge." See *West Virginia Code* §48-29-102. This new domestic relations provision supports AT&T's position that a wife has authority to make decisions and act on behalf of her husband. The Staff's position here is contrary to that Legislative recognition.

C. FCC Rules (Followed by the Vast Majority of States) Permit Persons With "Apparent Authority" to Order Changes To Telephone Service.

The FCC's rules define the "subscriber" authorized to request a change in long distance services as "any one of the following:

> (1) The party identified in the account records of a common carrier as responsible for payment of the telephone bill;
>
> (2) Any adult person authorized by such party to change telecommunications services or to charge services to the account; or
>
> (3) Any person contractually or otherwise lawfully authorized to represent such party."

47 CFR 64.1100(h)

Thus, by their own terms, the FCC rules provide a far more expansive definition of the "subscriber" allowed to order changes to telephone service than what this Commission's Staff would allow.

The Courts have recently clarified that the FCC's rule must be read expansively to enable persons with "apparent authority" to request a change in service. Less than a year ago, on April 8, 2003, the United States Court of Appeals for the District of Columbia, in *AT&T v. FCC*, 323 F.3d 1081 (D.C. 2003), dismissed any notion that only the "actual subscriber" could authorize a change in service, finding that such a requirement "charges carriers that engage in telemarketing with a virtually impossible task: guaranteeing that the person who answers the telephone is in fact authorized to make changes to that telephone line." The Court recognized that carriers "generally have no way of knowing who subscribers may have authorized to make changes on their behalf" and so must "depend on the veracity of the person answering the phone." Thus, so long as the person

contacted asserts that he or she has authority to request the change in service, the carrier may process the change without subjecting themselves to regulatory penalties.

This approach makes eminent sense. AT&T, as the carrier trying to enlist a new customer, does not have access to the customer's existing telephone service records and, thus, does not know the identity of the customer of record when it is selling telephone service to a new subscriber. Even if it did, it has no way of knowing whether additional individuals may have been authorized to make carrier-selection choices on that subscriber's behalf. Interpreting the rules as narrowly as Staff would read them, therefore, would mean that AT&T would not be able to serve an elderly parent in whose name a line is registered but who prefers to have an adult child act on his or her behalf. Nor would AT&T be able to satisfy the request of a working adult whose name appears on the account but who also authorizes his or her spouse (or roommate, boyfriend, etc.) to deal with carrier-selection issues. Indeed, if the rules are read as narrowly as Staff would interpret them, AT&T would not be able to sell service to a business in whose name a line may be subscribed, because AT&T would not know the names of the individual(s) authorized to administer its telecommunications accounts.

The overwhelming majority of states allow carriers to make changes to a customer's telephone service so long as the person ordering the service asserts that he or she has authority to do so. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South

Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Virginia, Wisconsin and Wyoming all permit consumers with "apparent authority" to request changes in their telecommunications services. West Virginia should join them.

D. The Change AT&T Seeks Will In No Way Hinder Customers With Legitimate "Slamming" Concerns From Having Those Concerns Addressed

As experience in other states demonstrates, consumers are well served by making it easy and convenient for them to do business with telecommunications providers. This increase in consumer convenience far outweighs any increased potential for slamming complaints.

In the few instances where a customer has, in fact, been slammed, or where the customer of record subsequently objects to the agent's actions, that person can and will be protected. As is the case today, the customer can ask the carriers to fix the problem. If the carriers refuse then, like today, the customer can file a complaint with the Commission. Then, if the telephone company is unable to prove it had a reasonable basis for believing that the caller had apparent authority to request the change, and is unable to show through the third party verification ("TPV") process that the change was reasonable, it is fair to conclude that the customer has been slammed. In those circumstances, the customer's service will be restored to the rightful carrier and refunded any improperly billed amounts. This is the process that has been relied upon successfully at the FCC and in many other jurisdictions, and one that should be replicated in West Virginia.

Thus, for example, where a divorcing spouse claims authority to request a change and, upon complaint and investigation, it is subsequently determined there was no

authority, AT&T will remedy the problem. The same will hold true in any other circumstance where a caller claims authority to request a change he or she had no right to request.

CONCLUSION

AT&T respectfully requests that the Commission enter an Order declaring that the term "subscriber" as used in *West Virginia Code* §24-2E-1 *et seq.* and rule 2.8 of the Commission's Telephone Rules, includes persons that assert "apparent authority" to request a change in service. Empowering such persons to request changes in telephone services will align West Virginia with the FCC's rules and with the vast majority of states. More importantly, it will help make it faster, easier and more convenient for West Virginia consumers to obtain the telecommunications services they want.

Respectfully submitted,

AT&T COMMUNICATIONS OF WEST VIRGINIA, INC.

By its attorneys

Mark A. Keffer [State Bar No. 1988]
3033 Chain Bridge Road
Oakton, VA 22185-0001
703-277-7343

Robert R. Rodecker [State Bar No. 3145]
1230 BB&T Square
Post Office Box 3713
Charleston, WV 25337
304-343-1654

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CERTIFICATE OF SERVICE

I, Tracy Lea Rudnicki, do hereby certify that on this 14th day of June 2004, a copy of the foregoing "AT&T Comments" was served by U.S. first class mail, postage prepaid, on the parties listed below.

/s/ Tracy Lea Rudnicki
Tracy Lea Rudnicki

Marlene H. Dortch*
Office of the Secretary
Federal Communications Commission
445 12th Street, SW Suite TW-A325
Washington, DC 20554

David Macks, Esq.*
Policy Division
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Nancy Stevenson, Esq. *
Deputy Division Chief
Policy Division
Consumer and Governmental Affairs Bureau
Federal Communications Divison
445 Twelfth Street, SW
Washington, DC 20554

Calvin Osborne*
Policy Division
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Best Copy & Printing, Inc.*
Federal Communications Commission
Portals II
445 Twelfth Street, SW, Room CY-B402
Washington DC 20554

Sandra Squire
Director
Office of Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301

Kecia Boney Lewis
Karen Reidy
MCI
1133 19th Street, NW
Washington, DC 20036

*By electronic mail